Supreme Court, U.S.
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No. 09-812

IN THE

Supreme Court of the United States

LILIAN S. ILETO,

Petitioner,

v.

GLOCK, INC., RSR MANAGEMENT CORP. and RSR GROUP NEVADA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS GLOCK, INC., RSR MANAGEMENT CORP. and RSR GROUP NEVADA, INC.

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Glock, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

RSR Management Corp. states that its parent corporation is RSR Group, Inc. There are no publicly held companies that own ten percent or more of the stock of RSR Management Corp. or RSR Group, Inc.

RSR Group Nevada, Inc. states that its parent corporation is RSR Group, Inc. There are no publicly held companies that own ten percent or more of the stock of RSR Group Nevada, Inc. or RSR Group, Inc.

TABLE OF CONTENTS

	Page
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION/SUMMARY OF THE ARGUMENT	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	7
I. The Ninth Circuit Court Of Appeals' Decision Regarding The Applicability Of The PLCAA Is Not In Conflict With The Decision Of Another United States Court of Appeals Or State Court Of Last Resort	8
II. The Ninth Circuit Court Of Appeals Joined Every United States Court Of Appeals To Have Addressed The Issue In Ruling That Petitioner's Pending Tort Claims Did Not Give Rise To A Vested Property Right In The Absence Of A Final, Unappealable Judgment And Could Be Legislatively Modified, Consistent With Due Process, Subject Only To Rational Basis Review	14

Contents

Page

III. The Ninth Circuit Court Of Appeals Correctly Held That The PLCAA Does Not Violate The Principle of Separation of Powers By Directing The Outcome Of A Pending Case Because It Changed The Law To Be Applied By The Courts 25

CONCLUSION 33

TABLE OF CITED AUTHORITIES

Page

CASES

149 Madison Avenue Corp. v. Asselta,
331 U.S. 795 (1947) 22

Adams v. Hinchman,
154 F.3d 420 (D.C. Cir. 1998) 23, 24

Adames v. Sheahan,
909 N.E.2d 742 (Ill. 2009) 7

Arbour v. Jenkins,
903 F.2d 416 (6th Cir. 1990) 24

Callet v. Alioto,
290 P. 438 (Cal. 1930) 18, 19

City of New York v. Beretta U.S.A. Corp.,
401 F. Supp. 2d 244 (E.D.N.Y. 2005) 8, 10

City of New York v. Beretta U.S.A. Corp.,
524 F.3d 384 (2d Cir. 2008) ..... *passim*

Deck v. Peter Romein's Sons, Inc.,
109 F.3d 383 (7th Cir 1997) 24

District of Columbia v. Beretta U.S.A. Corp.,
940 A.2d 163 (D.C. 2008) ..... *passim*

Ducharme v. Merrill-Nat'l Lab.,
574 F.2d 1307 (5th Cir. 1978) 15

Cited Authorities

Page

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 14, 21

Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174 (D.D.C. 2009) 13, 32, 33

Fein v. Permanente Med. Group, 474 U.S. 892 (1985) 14

Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997) 23

Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) 17, 24

Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987) 15

Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009) ..... *passim*

In re Consolid. U.S. Atmospheric Testing Litig., 820 F.2d 982 (9th Cir. 1987) 17, 24

In re TMI, 89 F.3d 1106 (3d Cir. 1996) 17, 24

In re Jones Truck Lines, Inc., 57 F.3d 642 (8th Cir. 1995) 24

Cited Authorities

Page

Kyle Railways, Inc. v. Pacific Admin. Services, Inc., 990 F.2d 513 (9th Cir. 1993) 14

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 22

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 20

Lyon v. Augusta S.P.A., 252 F.3d 1078 (9th Cir. 2001) 23

Miller v. French, 530 U.S. 327 (2000) 30

Montgomery v. Daniels, 340 N.E.2d 444 (N.Y. 1975) 15

New York Cent. R.R. Co. v. White, 243 U.S. 188 (1917) 21

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855) 30

Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 17

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 22, 23, 30, 31

Cited Authorities

Page

Robertson v. Seattle Audubon Society,
503 U.S. 429 (1992) 31, 32

Salmon v. Schwarz,
948 F.2d 1131 (10th Cir. 1991) 24

Smith & Wesson Corp. v. City of Gary,
875 N.E.2d 422 (Ind. Ct. App. 2007) ... 8, 9, 10, 12

Sowell v. American Cyanamid Co.,
888 F.2d 802 (11th Cir. 1989) 24

Town of Castle Rock, Col. v. Gonzales,
545 U.S. 748 (2005) 19

United States v. Klein,
80 U.S. 128 (1871) ..... *passim*

United States v. Padelford,
76 U.S. 531 (1869) 27

United States v. Schooner Peggy,
5 U.S. 103 (1801) 22

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 16

Cited Authorities

Page

STATUTES

15 U.S.C. §§ 7901-7903 ..... *passim*

15 U.S.C. §§ 6601-6617 15

18 U.S.C. § 924(h) 4

42 U.S.C. § 1791 15

49 U.S.C. § 40101 15

50 U.S.C. § 1885a 15

California Civil Code § 1714 ..... 5, 11

California Civil Code § 3479 ..... 5, 11

California Civil Code § 3480 ..... 5, 11

District of Columbia Code § 7-2551.01 12

Indiana Code § 32-30-6-6 ..... 8, 9, 10

New York Penal Law § 240.45 ..... 8, 10, 11, 12

INTRODUCTION/SUMMARY OF THE ARGUMENT

Respondents, Glock, Inc. ("Glock") and RSR Management Corp. and RSR Group Nevada, Inc. (collectively "RSR"), respectfully request that the Court deny the petition for a writ of certiorari filed by Lilian S. Ileto ("Ileto") for three fundamental reasons:

First, there is no conflict between the Ninth Circuit Court of Appeals' decision in this case and the decision of another United States court of appeals or state court of last resort regarding the application of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA"), that needs to be resolved by the Court.

Second, the Ninth Circuit applied settled law followed by every United States court of appeals in holding that Petitioner's pending tort claims, which had not ripened into a final unappealable judgment, are not vested rights and can be legislatively modified consistent with due process, subject to rational basis review.

Third, the Court of Appeals' decision that by enacting the PLCAA Congress did not violate the principle of separation of powers by directing the outcome of a pending case because it changed the applicable law to be applied by the courts is consistent with the Court's precedent and the decisions of the other United States courts of appeals and state courts of last resort that have considered this issue.

Simply stated, Petitioner has presented no compelling reason for certiorari.

STATEMENT OF THE CASE

Glock sold two Model 26 9mm semi-automatic pistols to the Cosmopolis Police Department ("Cosmopolis PD") in Washington State. App. 79a. The Cosmopolis PD subsequently determined that the Model 26 was too small for its needs and contacted Don Dineen, a former Reserve Police Officer who operated a gun store in Cosmopolis, to exchange them for larger Glock Model 19 9mm pistols. *Id.* Dineen obtained two Model 19 pistols from wholesale distributor RSR and provided them to the Cosmopolis PD in exchange for the two Model 26 pistols. *Id.* Dineen was not required to pay RSR for the Model 19 pistols until after he sold the Model 26 pistols. *Id.* Dineen subsequently sold one of the Glock Model 26 pistols to David Wright. *Id.* Wright, in turn, sold that Model 26 pistol to Andrew Palmer. App. 79a-80a. Palmer is alleged to have then sold the Model 26 pistol to Buford Furrow. App. 80a. On August 10, 1999, Furrow shot and killed Petitioner's son using the Glock Model 26 pistol that Glock had originally sold to the Cosmopolis PD. App. 75a-77a. RSR never owned, sold or possessed the Glock Model 26 pistol that had been used by Furrow. App. 79a.

Notwithstanding the above facts, Petitioner sued Glock and RSR, raising negligence and nuisance claims. App. 5a. The U.S. District Court for the Central District of California dismissed her complaint for failure to state a claim upon which relief can be granted. *Id.* Based on Petitioner's argument that Glock and RSR had "arranged for the sale of the [Model 26 pistol] to the police department and its subsequent sale to gun dealers to facilitate the creation of an illegal secondary

gun market," App. 134a-135a, a panel of the Ninth Circuit Court of Appeals reversed and remanded the case for further proceedings. App. 128a-177a. Judge Cynthia Holcomb Hall dissented on the basis that Petitioner's claims had no basis in California law, but were being allowed to proceed because of the judges' personal views and "desire to see that [Petitioner has her] day in court." App. 178a. Eight circuit judges dissented from the denial of the petition for rehearing *en banc*, noting that Petitioner's claims have no basis in California law, and that she did not even contend that Glock and RSR had done anything illegal. App. 192a-208a.

Congress enacted the PLCAA on October 26, 2005, in response to this case, and others like it, that had been brought in recent years against manufacturers and sellers of firearms attempting to hold them liable for harm resulting from the criminal misuse of their products. *See* 15 U.S.C. §§ 7901(a)(3)-(8), (b)(1), (4). The PLCAA requires courts to immediately dismiss any "qualified civil liability action" pending on the date of its enactment. *Id.* at § 7902(b).

As defined by the PLCAA, and subject to six limited exceptions, a "qualified civil liability action" is a:

> civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product or a trade association, for damages, punitive damages, injunctive or declaratory relief, or penalties or other relief resulting from the

> criminal or unlawful misuse of a qualified product by the person or a third party. . . .

15 U.S.C. § 7903(5)(A). Based on the allegations in the complaint, this case constitutes a "qualified civil liability action" because it is a civil action brought by a person (Lilian S. Ileto) against the manufacturer and sellers of a qualified product (Glock and RSR) for damages, punitive damages and other relief resulting from the criminal use (the shooting of Joseph S. Ileto) of the qualified product (the Glock Model 26 pistol) by a third party (Buford Furrow). Respondents accordingly filed a motion to dismiss pursuant to the PLCAA.

In response to the undeniable applicability of the PLCAA to her claims, Petitioner argued that her case fit within one of the six exceptions to the definition of a "qualified civil liability action." Through the six exceptions set forth in section 7903(5)(A), Congress specified several grounds on which a plaintiff can bring or maintain a lawsuit against a firearm manufacturer or seller based on a third party's criminal acts. Some of the claims preserved by the six exceptions to a "qualified civil liability action" are common law claims, *see, e.g.*, 15 U.S.C. § 7903(5)(A)(ii) (negligent entrustment or negligence *per se*), and some are statute-based, *see, e.g.*, *id.* § 7903(5)(A)(i) (violation of 18 U.S.C. § 924(h) or comparable State felony law). Petitioner argued that her case fell within the exception provided by 15 U.S.C. § 7903(5)(A)(iii), which preserves from dismissal actions in which a manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing of [a firearm], and the violation was a proximate cause of the harm for which relief is sought"

("predicate exception"). The statutes on which Petitioner attempted to rely to satisfy the predicate exception were California Civil Code §§ 1714 (Responsibility for willful acts and negligence; contributory negligence), 3479 (Nuisance defined) and 3480 (Public nuisance). In the alternative, Petitioner argued that the PLCAA was unconstitutional. The District Court held the PLCAA to be constitutional and granted Respondents' motion to dismiss Petitioner's claims against them pursuant to the PLCAA. Petitioner appealed the dismissal of her claims.

In an opinion dated May 11, 2009, the United States Court of Appeals for the Ninth Circuit affirmed, holding that the PLCAA bars Petitioner's "classic negligence and nuisance" claims against Respondents. *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009). The Ninth Circuit noted that Petitioner did not allege that Respondents "violated any statute prohibiting manufacturers or sellers from aiding, abetting, or conspiring with another person to sell or otherwise dispose of firearms to illegal buyers." *Ileto*, 565 F.3d at 1130. Accordingly, in her attempt to meet the requirements of the predicate exception to the PLCAA, Petitioner did not rely on an alleged knowing violation of a separate statute, but simply claimed that California's general tort law satisfied the predicate exception because it had been codified. *Id.* at 1132-33. The Court of Appeals held that the PLCAA was "clearly intended to preempt common-law claims, such as general tort theories of liability," and that Petitioner's claims were "general tort theories of liability that traditionally have been embodied in the common law." *Id.* at 1135.

The Ninth Circuit rejected Petitioner's claim that the codification of California's common law transformed her claims into statutory ones applicable to the sale or marketing of firearms for purposes of the predicate exception to the PLCAA. *Ileto*, 565 F.3d at 1136. It held that the "judicial evolution" of common law claims was a basis for the PLCAA's decision to bar them and that the "statutes" upon which Petitioner based her claims remain "subject to the same 'judicial evolution' as ordinary common-law claims in jurisdictions that have not codified common law." *Id.* at 1136. The Court of Appeals further noted that the predicate exception to the PLCAA was designed to apply only to "statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry – rather than general tort theories that happened to have been codified by a given jurisdiction." *Id.* at 1136. It further held that this interpretation of the PLCAA was necessary to maintain "Congress' intention to create national uniformity," because to hold otherwise would allow lawsuits based on general tort theories to proceed in those states that had codified their common law, while preempting them in all other states. *Id.* at 1136.

The Ninth Circuit Court of Appeals also held that the PLCAA is constitutional, both facially and as applied to Petitioner's claims. *Ileto*, 565 F.3d at 1138-46. In doing so, the Ninth Circuit joined the Court of Appeals for the Second Circuit, the District of Columbia Court of Appeals, and the Illinois Supreme Court in rejecting Petitioner's attacks on the constitutionality of the PLCAA. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 1579 (2009); *District of Columbia v. Beretta U.S.A.*

Corp., 940 A.2d 163 (D.C. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 1579 (2009); *Adamcs v. Sheahan*, 909 N.E.2D 742 (Ill.), *cert. denied*, __ U.S. __, 130 S. Ct. 1014 (2009).

REASONS FOR DENYING THE PETITION

The Court will only grant a petition for a writ of certiorari for compelling reasons. Rule 10. The Court will not usually consider a petition for a writ of certiorari from a decision by a United States court of appeals unless it "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter [or] has decided an important federal question in a way that conflicts with a decision by a state court of last resort," Rule 10(a), or has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court, Rule 10(c). Petitioner has failed to satisfy the criteria set forth in Rule 10 relative to her challenges to both the applicability and constitutionality of the PLCAA and therefore her petition for a writ of certiorari should be denied.

I. The Ninth Circuit Court Of Appeals' Decision Regarding The Applicability Of The PLCAA Is Not In Conflict With The Decision Of Another *United States Court of Appeals Or State Court* Of Last Resort

Petitioner contends that her petition for a writ of certiorari should be granted because the Ninth Circuit's construction of the PLCAA "squarely conflicts with the decisions of other courts. . . ." Pet. at 13. The "decisions of other courts" referenced by Petitioner, however, are a decision by a state intermediate appellate court, *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), and *dicta* from another United States court of appeals, *City of New York*, 524 F.3d 384. Pet. at 14-21. Further, the holdings of these cases are not in conflict with the holding of the Ninth Circuit in this case regarding the applicability of the PLCAA.

In *City of Gary*, Indiana's intermediate court of appeals held that Indiana's public nuisance statute, Indiana Code § 32-30-6-6, was applicable to the sale or marketing of firearms for purposes of satisfying the predicate exception to the PLCAA. In doing so, it relied on the only other decision to have interpreted the PLCAA at that time, the U.S. District Court for the Eastern District of New York's since reversed decision in *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005), *rev'd in part*, 524 F.3d 384, that had held that N.Y. Penal Law § 240.45 was applicable to the sale or marketing of firearms for purposes of satisfying the predicate exception to the PLCAA. *City of Gary*, 875 N.E.2d at 431. The Indiana Court of Appeals also felt constrained by a prior decision by the

Indiana Supreme Court in that case that had held, prior to the enactment of the PLCAA, that Indiana Code § 32-30-6-6 was applicable to the sale and marketing of *firearms*. *Id.* at 431 ("Accordingly, the issue is whether Indiana's public nuisance statute, as applied by the Indiana Supreme Court to the alleged conduct of the Manufacturers, is a statute applicable to the sale or marketing of firearms for purposes of the PLCAA."); *see also id.* at 434.

In addition, the Indiana Court of Appeals noted that the City of Gary had "alleged violations of Indiana statutes that are specifically applicable to the sale or marketing of firearms." *City of Gary*, 875 N.E.2d at 430-31. Accordingly, it alternatively held that even if the "PLCAA requires an underlying violation of a statute directly applicable to the sale or marketing of a firearm, the City alleged such violations in their complaint." *Id.* at 432-33. The Indiana Court of Appeals distinguished its holding from the District Court's holding in this case, on the basis that the *Ileto* plaintiffs did not allege that the defendants engaged in activity "that facilitates unlawful sales and violates regulatory statutes." *Id.* at 433 n.7. Similarly, the Ninth Circuit specifically distinguished the Indiana Court of Appeals' decision because, unlike Petitioner, the City of Gary "had alleged violations of [Indiana's] *statutory firearm regulations*." *Ileto*, 565 F.3d at 1135 n.5 (emphasis in original).

Given the fact that the *City of Gary* decision was issued by a state intermediate appellate court, an alleged conflict between it and the Ninth Circuit's decision in this case fails to meet the requirement for

granting certiorari set forth in Rule 10(a). Further, as discussed above, the Indiana Court of Appeals stated that it felt constrained to hold as it did by the Indiana Supreme Court's interpretation of Indiana Code § 32-30-6-6 prior to the enactment of the PLCAA, and the only case on which it had to reply in interpreting the PLCAA was the since reversed decision by the District Court in *City of New York*, 401 F. Supp. 2d 244. The Indiana Supreme Court, that state's court of last resort, may still consider the issue, either in the *City of Gary* case or in another case, and hold that Indiana's public nuisance statute does not satisfy the predicate exception to the PLCAA. In addition, the Indiana Court of Appeals' alternate holding that the City had also alleged violations of Indiana statutes that unquestioningly applied to the sale and marketing of firearms renders the alleged conflict with the Ninth Circuit's decision in this case a moot issue that does not need to be resolved by the Court.

In *City of New York*, the Court of Appeals for the Second Circuit held that New York's public nuisance statute, N.Y. Penal Code § 240.45(1), was not applicable to the sale or marketing of firearms for purposes of satisfying the predicate exception to the PLCAA. The Court of Appeals held that "New York Penal Law § 240.45 is a statute of general applicability that does not encompass the conduct of firearms manufacturers of which the City complains. It does not fall within the predicate exception to the claim restricting provisions of the PLCAA." *City of New York*, 524 F.3d at 400. The Second Circuit concluded that the term "applicable to" should be construed "to mean statutes that clearly can be said to regulate the firearms industry," *id.* at 402,

such as statutes that regulate the "manufacture, importation, possession, sale, and use of firearms," including the Gun Control Act, the National Firearms Act and the Arms Control Act, *id.* at 403. The Court of Appeals reasoned that interpreting the exception to the PLCAA to encompass any statute that is "capable of being applied" to the sale or marketing of firearms "would allow the predicate exception to swallow the rule, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets." *Id.* at 403.

The Second Circuit Court of Appeals continued to state that the predicate exception to the PLCAA:

> (1) does not encompass New York Penal Law § 240.45; (2) does encompass statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms; and (3) does encompass statutes that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.

City of New York, 524 F.3d at 404. It is the language in the Second Circuit's decision regarding a statute that "courts have applied to the sale and marketing of firearms" serving as the predicate statute for the exception to the PLCAA that Petitioner claims serves as the basis for the conflict with the Ninth Circuit's decision in this case, because it had held that California Civil Code §§ 1714(a), 3479 and 3489 were applicable to the sale or marketing of firearms prior to the enactment of the PLCAA. Pet. at 21. Petitioner claims that the

Second Circuit "held that a state statute previously held applicable to the sale and marketing of firearms *would qualify* as 'applicable to' firearms sales and marketing within the meaning of the PLCAA 'if courts have applied [that statute] to the sale or marketing of firearms. . . .'" Pet. at 21 (emphasis added).

The language in the *City of New York* case upon which Petitioner relies, however, was *dicta*, as the decision itself makes clear: "We decline to foreclose the *possibility* that, *under certain circumstances*, state courts *may apply* a statute of general applicability to the type of conduct that the City complains of, in which case such a statute *might qualify* as a predicate statute." *Id.* at 400 (emphasis added).[1] This highly qualified statement of a possible future scenario does not create a conflict with the Ninth Circuit's decision in this case that needs to be resolved by the Court.

Despite Petitioner's claim that the "courts are in utter disarray" over the interpretation of the PLCAA, the decision below is consistent with the decisions in the *City of Gary* and *City of New York* cases, as well as another case interpreting the PLCAA that Petitioner has failed to address in her petition for a writ of certiorari. In *District of Columbia*, the District of Columbia Court of Appeals held that the Assault Weapons Manufacturing Strict Liability Act, D.C. Code § 7-2551.01 *et seq.* ("SLA") was not applicable to the sale

1. "It is not disputed that New York Penal Law § 240.45 is a statute of general applicability that has never been applied to firearms suppliers for conduct like that complained of by the City." *City of New York*, 524 F.3d at 399.

or marketing of firearms for purposes of the predicate exception to the PLCAA.[2] 940 A.2d 163. The Court of Appeals cited with approval the Superior Court's determination that the predicate exception to the PLCAA was only designed to apply to violations of "statutes regulating the manner in which firearms are sold or marketed, and not statutes that are merely capable of being applied to the result of the sale or marketing of firearms." *Id.* at 169. It continued to hold that the SLA is not a statute "regulating how – the manner in which – firearms are marketed," but rather imposes the type of liability that Congress sought to prohibit through the PLCAA. *Id.* The Court of Appeals noted that the predicate exception to the PLCAA requires the defendant to have knowingly violated a statute and therefore to serve as the predicate statute, a statute would have to "contain a prohibition against, or standards of, conduct that are being violated," but the SLA is not a statute that the defendants are capable of violating, because it "imposes no duty on firearms manufacturers or sellers to operate in any manner or according to any standards of care or reasonableness." *Id.* at 170 (describing the types of statutory violations listed in the PLCAA as examples that would satisfy the predicate exception).

Based on the above, Petitioner has failed to demonstrate that there is a compelling reason to grant certiorari, or even that the decision by the Ninth Circuit

2. Similarly in *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 181 (D.D.C. 2009), the court also held that the SLA is not a statute applicable to the sale or marketing of firearms for purposes of the PLCAA.

Court of Appeals in this case is in conflict with the decision of another United States court of appeals or state court of last resort. Accordingly, the petition for a writ of certiorari should be denied.

II. The Ninth Circuit Court Of Appeals Joined Every United States Court Of Appeals To Have Addressed The Issue In Ruling That Petitioner's Pending Tort Claims Did Not Give Rise To A Vested Property Right In The Absence Of A Final, Unappealable Judgment And Could Be Legislatively Modified, Consistent With Due Process, Subject Only To Rational Basis Review

Petitioner claims that the PLCAA is unconstitutional and violates her right to substantive due process because it deprives her of an accrued cause of action against Glock and RSR without providing her with a alternative remedy against them.[3] Pet. at 24-29.

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3. Petitioner's contention that she must be provided with an alternate remedy has no support in the Court's jurisprudence. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 (1978) (noting that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy"). Petitioner's citation to *Fein v. Permanente Med. Group*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting), is unavailing because the majority of the Court dismissed the appeal "for want of a substantial federal question." Lower courts have also expressed skepticism over claims similar to those advanced by Petitioner. *See, e.g., Kyle Railways, Inc. v. Pacific Admin. Services, Inc.*, 990 F.2d 513, 518-19 (9th Cir. 1993) (rejecting argument that, by preempting (Cont'd)

(Cont'd)

any state law causes of action while failing to provide substitute federal causes of action, ERISA left "gap" in law and violated due process: "[S]uch a gap is legitimate if it is the result intended by Congress.") (quoting *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987)); *Ducharme v. Merrill-Nat'l Lab.*, 574 F.2d 1307, 1310 (5th Cir. 1978) (upholding Swine Flu Act against due process challenge and noting that "[l]egislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away"); *Montgomery v. Daniels*, 340 N.E.2d 444, 453-54 (N.Y. 1975) (in upholding constitutionality of New York no-fault automobile accident compensation law, expressing skepticism that due process requires quid pro quo, but not reaching the issue: "Many States have abolished common-law causes of action by statute without providing any substitute remedy at all, e.g., the common-law right of a guest in an automobile to recover for the negligence of his host, or the common-law right of a party to sue in tort or contract for breach of promise to marry or for alienation of affections.") (citations and footnotes omitted). Several other recently enacted federal tort reform statutes do not provide any offsetting benefits for the common law causes of action they abrogate, at least to the parties directly affected by the loss of those claims. *See, e.g.*, FISA Amendments Act of 2008, 50 U.S.C. § 1885a (prohibiting actions against persons for providing assistance to the intelligence community); General Aviation Act, 49 U.S.C. § 40101 (18-year statute of repose for claims against aircraft manufacturers); Food Donation Act, 42 U.S.C. § 1791 (limiting liability for donors of food); Y2K Act, 15 U.S.C. §§ 6601-17 (capping damages against small businesses in Y2K actions). Nevertheless, these statutes provide benefits that extend to society as a whole, as does the PLCAA by preserving the viability of an industry that arms the nation's military and law enforcement personnel.

As the Ninth Circuit Court of Appeals recognized, Congress enacted the PLCAA because:

> It saw fit to adjust the incidents of our economic lives by preempting certain categories of cases brought against federally licensed manufacturers and sellers of firearms. In particular, Congress found that the targeted lawsuits constitute an unreasonable burden on interstate and foreign commerce of the United States, and sought to prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce. Congress carefully constrained the Act's reach to the confines of the Commerce Clause.

Ileto, 565 F.3d at 1140 (internal citations and punctuation omitted). It is "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Further,

> the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom

> of such legislation remain within the exclusive province of the legislative and executive branches.

Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984).[4] The Ninth Circuit Court of Appeals correctly held that the PLCAA easily passes constitutional muster under this standard:

> We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected. And it was eminently rational for Congress to conclude that the purposes of the PLCAA could be more fully effectuated if its provisions were applied retroactively.

Ileto, 565 F.3d at 1140-41 (citation and punctuation omitted). *See also City of New York*, 524 F.3d at 394-95;[5] *District of Columbia*, 940 A.2d at 174-75.[6]

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4. In keeping with these cases, courts have uniformly considered due process challenges to retroactive legislation affecting pending tort claims under the rational basis standard. *See, e.g., In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (Price-Anderson Amendment of 1988); *In re Consolid. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 990-91 (9th Cir. 1987) (Department of Energy National Security and Military Applications of Nuclear Authorization Act of 1985); *Hammond v. United States*, 786 F.2d 8, 13-14 (1st Cir. 1986) (same).

5. "We find that Congress has not exceeded its authority in this case, where there can be no question of the interstate (Cont'd)

Petitioner suggests that the PLCAA should be subjected to more searching scrutiny than rational basis review because it deprives her of a protected property interest without providing her with an alternative remedy, relief or compensation. Pet. at 24-29. Petitioner cites *Callet v. Alioto*, 290 P. 438, 440 (Cal. 1930) for the proposition that pursuant to California law, an "accrued cause of action at common law or under a statute codifying the common law is a 'vested property right' entitled to constitutional protection." Pet. at 24. Petitioner's reliance on *Callet* is misplaced for two reasons. First, the *Callet* decision did not hold that an accrued common law cause of action is entitled to constitutional protection. The *Callet* decision addressed rules of statutory construction,[7] not of constitutional law,

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character of the industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail." *City of New York*, 524 F.3d at 395.

6. "[T]he PLCAA . . . is reasonably viewed as an adjustment of the burdens and benefits of economic life by Congress, one it deemed necessary in exercising its power to regulate interstate commerce." *District of Columbia*, 940 A.2d at 175 (internal citation and punctuation omitted).

7. There are certain rules of statutory construction which are applicable to the facts here presented. It is too well settled to require citation of authority that in the absence of a clearly expressed intention to the contrary, every statute will be construed so as not to affect pending causes of action. Or, as the rule is generally stated, every statute will be

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and held that a statute did not repeal by implication a cause of action that had accrued under the common law before it was enacted. 290 P. at 440-41. Second, it is federal constitutional law, not state law, that determines whether a property interest "rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Town of Castle Rock, Col. v. Gonzales*, 545 U.S. 748, 757 (2005) (citation and quotation marks omitted).

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> construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. It is also a general rule, subject to certain limitations not necessary to discuss here, that a cause of action or remedy defendant [*sic*] on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time. This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action.

Callet, 290 P. at 440 (internal citations omitted).

Petitioner also cites *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 430-31 (1982) for the proposition that a cause of action is a species of property protected by due process. Pet. at 25. But simply because a cause of action constitutes property does not mean that Congress cannot modify or eliminate it without violating due process. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the State of Illinois terminated the plaintiff's cause of action for employment discrimination because a state official failed to comply with a statutorily mandated procedure. *Id.* at 424. The Court held that the State's action violated the plaintiff's right to procedural, not substantive, due process. *Id.* at 432-37. In the present case, Petitioner's claims against Glock and RSR were not dismissed because of a procedural default, but because Congress changed the law applicable to her claims when it enacted the PLCAA. As the Court explicitly held in *Logan*, however, Congress "remains free to create substantive defenses or immunities" to a cause of action and, while such changes to the law might "deprive . . . plaintiffs of a protected property interest," they are "not thereby deprived of property without due process" because "the legislative determination provides all the process that is due." *Id.* at 432-33 (citations omitted).

The Ninth Circuit Court of Appeals rejected Petitioner's argument that the PLCAA violates her right to due process by depriving her of her causes of action against Glock and RSR, holding that "although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." *Ileto*, 565 F.3d at 1141 (citation and quotation marks omitted). *See also*

District of Columbia, 940 A.2d at 176 (rejecting an identical challenge to the constitutionality of the PLCAA and explaining the difference between "causes of action that have reached final, unreviewable judgment – and in *that* sense have vested – and all others, pending and future, which may be modified by rationally grounded retroactive legislation") (emphasis in original). The principle that a cause of action does not automatically give rise to a vested property right is well-established in the Court's jurisprudence:

> Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby.

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (internal citations and quotation marks omitted); *see also New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.").

This rule is a corollary to the settled principle that a "court should apply the law in effect at the time it renders its decision, even though that law was enacted

after the events that gave rise to the suit."[8] *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994) (internal citation and quotation marks omitted). The Court recently reaffirmed this principle in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), in explaining the difference between pending claims (which are subject to modification through retroactive legislation) and final, unappealable judgments (which are not):

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly. * * * * It is the obligation of the last court in the hierarchy that rules on the

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8. The Court applied this principle more than two hundred years ago in the case of *United States v. Schooner Peggy*, 5 U.S. 103 (1801), in which Chief Justice Marshall, writing for a unanimous Court, reversed a judgment condemning a French vessel seized on American waters because an intervening treaty, first enacted while the case was on appeal, provided for the restoration of captured property "not yet definitively condemned." 5 U.S. at 107. "[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.* at 110. *See also 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795 (1947), *modifying* 331 U.S. 199, (After it had affirmed judgment for overtime pay due plaintiffs under the Fair Labor Standards Act ("FLSA"), the Court remanded the case, in response to a timely motion for rehearing, for consideration of the effect of the newly enacted Portal-to-Portal Act, which gave employers good-faith defenses to back overtime pay suits under the FLSA).

> case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must decide according to existing laws. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.

Id. at 226-27 (internal citation and quotation marks omitted) (emphasis in original). *See also Gavin v. Branstad*, 122 F.3d 1081, 1090-91 (8th Cir. 1997) ("The doctrine of vested rights . . . like the separation-of-powers doctrine expounded in *Plaut*, depends on the existence of a final judgment [and] is really only the due process analogue of the separation-of-powers doctrine that prevents Congress from reopening final judgments of Article III courts."). Applying the above principles, every United States court of appeals that has addressed the issue has concluded that federal statutes modifying or abrogating pending state tort claims do not violate due process because there is no vested right in a cause of action absent a final, unappealable judgment.[9]

9. *See, e.g., Lyon v. Augusta S.P.A.*, 252 F.3d 1078, 1086-87 (9th Cir. 2001) (application of statute of repose in General Aviation Revitalization Act barring product liability action against aircraft manufacturer based on date of delivery of aircraft did not violate due process, even though it was enacted after accident for which plaintiffs were suing); *Adams v.*

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Hinchman, 154 F.3d 420, 424 (D.C. Cir. 1998) (retroactive application of federal statute to bar plaintiffs' pending claims for unpaid overtime compensation under Fair Labor Standards Act did not violate due process because "a cause of action affords no definite or enforceable property right until reduced to a final judgment") (citation and punctuation omitted); *Deck v. Peter Romein's Sons, Inc.*, 109 F.3d 383 (7th Cir. 1997) (retroactive application of the workers' compensation exclusivity amendment to the Migrant and Seasonal Agricultural Workers Protection Act to bar plaintiff's pending wrongful death claim did not violate due process); *In re TMI*, 89 F.3d at 1113 (retroactive application of Price-Anderson Amendment requiring application of Pennsylvania's statute of limitations to all actions arising from Three Mile Island nuclear accident did not violate due process even though it resulted in dismissal of plaintiffs' lawsuits filed in Mississippi under longer statute of limitations); *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995) ("Causes of action are . . . not fully vested interests until reduced to final judgment."); *Salmon v. Schwarz*, 948 F.2d 1131, 1142-44 (10th Cir. 1991) (upholding retroactive application of Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA") to pending tort claim); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (same); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (retroactive application of FELRTCA to employee's claim on appeal was constitutional, even though it resulted in setting aside plaintiff's judgment: "The fact that the statute is retroactive does not make it unconstitutional as a legal claim affords no definite or enforcible [*sic*] property right until reduced to final judgment.") (citations omitted); *In re Consolid. U.S. Atmospheric Testing Litig.*, 820 F.2d at 989 (a tort claim "is inchoate and affords no definite and enforceable property right until reduced to final judgment"); *Hammond*, 786 F.2d at 12 (retroactive application of Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act, which
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Petitioner has failed to demonstrate that the Ninth Circuit Court of Appeals' decision that the PLCAA is constitutional and does not violate her right to due process is in conflict with relevant decisions of this Court or a decision of another United States court of appeals or state court of last resort and therefore she has failed to establish a compelling reason for certiorari pursuant to Rule 10.

III. The Ninth Circuit Court Of Appeals Correctly Held That The PLCAA Does Not Violate The Principle of Separation of Powers By Directing The Outcome Of A Pending Case Because It Changed The Law To Be Applied By The Courts

Petitioner contends that the PLCAA "violates the basic rule of judicial independence reflected in *United States v. Klein*," because "Congress *intended* the PLCAA to apply to this specific case." Pet. at 30 (emphasis in original). Petitioner is incorrect. In *Klein*, the Court considered whether Congress could legislatively change the evidentiary effect that the Court had previously given to a presidential pardon. 80 U.S. 128 (1871). An understanding of the facts leading to the Court's decision in *Klein* is necessary to understand its

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resulted in dismissal of widow's lawsuit against government contractor for wrongful death and loss of consortium arising from her husband's death from radiation exposure did not violate due process: "Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort.").

holding. On July 25, 1862, during the Civil War, the President issued a proclamation stating that, in sixty days:

> all the estates and property of those who did not cease to aid, countenance, and abet the rebellion became liable to seizure and confiscation, and it was made the duty of the President to cause the same to be seized and applied, either specifically or in the proceeds thereof, to the support of the army.

Klein, 80 U.S. at 137. The Abandoned and Captured Property Act of March 12, 1863 ("ACPA") provided for the return of the proceeds of property seized from persons in the states that seceded, if they proved that they had not given aid or comfort to the rebellion. *Id.* at 136-39. On December 8, 1863, the President:

> offered a full pardon, with restoration of all rights of property . . . to all . . . who having been engaged in the rebellion as actual participants, or as aiders and abettors, would take and keep inviolate a prescribed oath. By this oath the person seeking to avail himself of the offered pardon was required to promise that he would thenceforth support the Constitution of the United States and the union of the States thereunder. . . .

Id. at 139-40. The President continued to offer successive pardons through December 25, 1868, when he issued a full and unconditional pardon without the requirement for an oath, but with the same restoration of property rights. *Id.* at 140-41.

The Court had previously held that a person pardoned by the President was entitled to the return of the proceeds of property that had been seized from him pursuant to the ACPA because:

> after the pardon no offence connected with the rebellion can be imputed to him. If, in other respects, the petitioner made the proof which, under the [ACPA] entitled him to a decree for the proceeds of his property, the law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion. A different construction would, as it seems to us, defeat the manifest intent of the proclamation. . . .

United States v. Padelford, 76 U.S. 531, 543 (1869). *See also Klein*, 80 U.S. at 142.[10] V.F. Wilson, a person who had given aid and comfort to the rebellion, took

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10. It was for the government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the offered pardon. It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promises took full effect. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war.

Klein, 80 U.S. at 142.

the oath of allegiance offered by the President on February 15, 1964, and thereby received a pardon, which included the restoration of his property rights. *Klein*, 80 U.S. at 132. Wilson died in 1865 and Klein, the administrator of his estate, filed a petition in the Court of Claims seeking to recover the proceeds of certain cotton that had been seized from Wilson pursuant to the ACPA. *Id.* On May 26, 1869, the Court of Claims held that Klein was entitled to recover the proceeds of the seized cotton on behalf of Wilson's estate, and the United States appealed. *Id.* at 132, 143. On July 12, 1870, while the appeal was pending, Congress passed a proviso to an appropriations bill, which stated that a pardon may not be used as evidence that a person did not provide aid and comfort to the rebellion for purposes of the ACPA. *Id.* at 133-34, 143-44. The law further provided that if evidence of a pardon was offered, it was to be taken as conclusive evidence that the person did, in fact, provide aid and comfort to the rebellion and was therefore not entitled to the return of the proceeds of property that had been seized from him. *Id.* at 134, 143-44.

The Court affirmed the judgment of the Court of Claims in favor of Klein, and declared the July 12, 1870 proviso to be unconstitutional because:

> Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases

> like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.
>
> It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

Klein, 80 U.S. 145-46. The Court specifically explained that the July 12, 1870 proviso was an unconstitutional violation of the principle of separation of powers because

"*no new circumstances have been created by legislation*, [b]ut the court is forbidden to give effect to evidence which, in its own judgment, such evidence should not have, and is directed to give it effect precisely contrary." *Id.* at 147 (emphasis added).

The Court subsequently held that "[w]hatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law." *Plaut*, 514 U.S. at 218 (citation and punctuation omitted).[11] *See also Miller v. French*, 530 U.S. 327, 347-49 (2000) (holding that

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11. Indeed, in *Klein* the Court specifically noted that:

> we do not at all question what was decided in the case of *Pennsylvania v. Wheeling Bridge Company*[, 59 U.S. 421 (1855)]. In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act.

80 U.S. at 146-47. By enacting the proviso at issue in *Klein*, Congress did not alter the applicable law, because the Supreme Court was construing the effect of a pardon, which the Constitution intrusted to the President, rather than a statute that could be altered by Congress. *Id.* at 147-48 (noting that "it is clear that the legislature cannot change the effect of a pardon").

Congress does not unconstitutionally prescribe a rule of decision when it alters the relevant law and thereby "imposes the consequences of the court's application of the new legal standard" on the parties); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 437-40 (1992) (holding that the Northwest Timber Compromise did not unconstitutionally "direct any particular findings of fact or applications of law, old or new, to fact," but rather changed the legal standard to be applied in two cases challenging logging in the Pacific Northwest).

Applying the Court's decisions in *Klein*, *Plaut* and *Robertson*, the Ninth Circuit Court of Appeals rejected Petitioner's separation of powers challenge to the constitutionality of the PLCAA on the basis that "Congress has amended the applicable law; it has not compelled results under old law. The PLCAA sets forth a new legal standard – the definition (with exceptions) of a 'qualified civil liability action' – to be applied to all cases." *Ileto*, 565 F.3d at 1139. The Court of Appeals further held that the "PLCAA applies only to pending and future cases and does not purport to undo final judgments of the judiciary. The mere fact that members of Congress wanted to preempt *this* pending case by name does not change our analysis." *Id.* at 1139-40 (emphasis in original).[12] Identical challenges to the

12. The fact that certain members of Congress believed that the PLCAA would, or should, result in the dismissal of Petitioner's claims does not violate principles of separation of powers or prescribe a rule of decision to the courts, because it was left to the courts to apply the PLCAA to her claims and determine whether they constitute a qualified civil liability action, which must be immediately dismissed. *See Robertson*,

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constitutionality of the PLCAA on the basis that it allegedly violates the principle of separation of powers have been rejected by the courts in *City of New York*, 524 F.3d at 395-96;[13] *District of Columbia*, 940 A.2d at 173;[14] and *Charlot*, 628 F. Supp. 2d at 184.[15]

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503 U.S. at 433-40 (rejecting a separation of powers challenge to the Northwest Timber Compromise, which referred to specific cases it would effect by name and docket number).

13. The PLCAA bars qualified civil liability actions, as defined in the statute. The definition of a qualified civil liability action permissibly sets forth a new legal standard to be applied to all actions. Because the PLCAA does not merely direct the outcome of cases, but changes the applicable law, it does not violate the doctrine of separation of powers.

City of New York, 524 F.3d at 395-96 (internal citations omitted).

14. The PLCAA sets forth new standards that must be met before a case may be brought or a pending one may proceed against the manufacturer or seller of a firearm for damages resulting from the use of the firearm by a third person. When, but only when, a suit is found by a court not to met one of the statutory exceptions to a 'qualified civil liability action,' it must be dismissed.

District of Columbia, 940 A.2d at 173.

15. The Court rejects plaintiffs' argument that the PLCAA imposes an impermissible rule of decision upon the courts. Unlike the provision at issue in *Klein*, the PLCAA does not directly interfere with judicial fact-finding. The PLCAA identifies particular types of claims

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Petitioner has failed to demonstrate the Ninth Circuit Court of Appeals' decision that the PLCAA is constitutional and does not violate the principle of separation of powers is in conflict with relevant decisions of this Court or a decision of another United States court of appeals or state court of last resort and therefore she has failed to establish a compelling reason for certiorari pursuant to Rule 10.

CONCLUSION

Petitioner has not established a compelling reason for the Court to grant her petition for a writ of certiorari, accordingly, Respondents respectfully request that it be denied.

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Respectfully submitted,

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> that are not permissible and leaves it to the courts to apply those standards in the cases before them. The statute permits the courts to determine whether the cases before them, such as this one, are covered by the PLCAA.

Charlot, 628 F. Supp. 2d at 184 (internal citations omitted).